



# STATE OF INDIANA

Mitchell E. Daniels, Jr.  
Governor

STATE BUDGET AGENCY  
212 State House  
Indianapolis, Indiana 46204-2796  
317-232-5610

Adam M. Horst  
Director

August 18, 2011

Nancy King  
Attorney  
IDEM Office of Legal Council  
100 North Senate Avenue N1307  
Indianapolis, IN 46204

Dear Ms. King:

Pursuant to the provisions of Executive Order 2-89 and Budget Agency Financial Management Circular 2010-4, the State Budget Agency has reviewed the proposed rule to amend 327 IAC 15-16 (LSA #09-213) which you submitted to the State Budget Agency on June 20, 2011.

After reviewing the proposed rule, the recommendation of the State Budget Agency is that the rule changes be approved.

Furthermore, the statement and analysis (attached hereto) provided by the Indiana Department of Environmental Management is hereby adopted as the Office of Management and Budget's own Fiscal Impact Statement for the purpose of satisfying the requirements under IC 4-22-2-28(d). Also, it is adopted as the Office of Management and Budget's cost benefit analysis under IC 4-3-22-13(a).

If you have questions concerning this action, please contact your budget analyst or Gayle Pierson at 232-5610.

Sincerely,

Adam M. Horst  
Director

AMH/GP

August 18, 2011

**Development of New Rules at 327 IAC 15-16 Concerning Concentrated Animal Feeding Operations**  
LSA Document #09-213

**Cost-Benefit Analysis**  
**(Financial Management Circular #2010-4)**

**A. Statement of Need**

1. Need for the rule. The primary goal of this rule is to comply with the Clean Water Act (CWA)(33 U.S.C. 1342), state law (IC 13-18-10) and the requirements of the order of the 2<sup>nd</sup> Circuit Court of Appeals in *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Circuit 2005) (*Waterkeeper*) by adopting the federal requirements for CAFOs in 40 CFR 122 and 40 CFR 412 that were amended by the U.S. Environmental Protection Agency (EPA) in 2008 (73 FR 70418) to comply with *Waterkeeper*.

This new rule repeals the existing National Pollutant Discharge Elimination System (NPDES) general permit provisions for concentrated animal feeding operations (CAFOs) in 327 IAC 5-4-3, 327 IAC 5-4-3.1 and 327 IAC 15-15 and incorporates by reference the amended federal rules for CAFOs in 40 CFR 122 and 40 CFR 412 and makes Indiana's CAFO standards consistent with current federal requirements. State water quality standards and effluent limitations that are referenced but not included in the EPA final rule and were added to make the permits functional and comply with CWA and court requirements. [40 CFR 122.42]

This rule will cover CAFOs that discharge to waters of the state. CAFOs that do not discharge will not be required to obtain permits under this rule, consistent with the recent decision of the 5<sup>th</sup> Circuit Court of Appeals in *National Pork Producers v. EPA* (Case number 08-61093, March 15, 2011).

As required under IC 13-18-10, those CAFOs that no longer require NPDES permits will be regulated under the new rules for confined feeding operations (CFOs) in 327 IAC 19 that are being developed as a parallel rulemaking (LSA Document #09-615).

2. Affected businesses and individuals. There are approximately 625 CAFOs in Indiana<sup>1</sup>. Of these, 116 [18%] are exempted from the current CAFO rules under 327 IAC 5-4-3(i)(3) and do not have an NPDES permit. These facilities currently operate under the CFO rules in 327 IAC 16 and will continue to operate under the new CFO rules in 327 IAC 19 (see LSA Document #09-615).

Of the remaining 509 CAFOs currently operating under NPDES individual permits or the NPDES general permit in 327 IAC 15-15, no more than 25 (5%) are discharging during the current NPDES permit term and will be required to obtain NPDES individual permits under this rule. In addition, an undetermined number, estimated to be less than 5%, will remain in the program for other reasons, including dairies that discharge non-contact cooling water. The remaining approximately 458 CAFOs that no longer need NPDES permits will be regulated under the new 327 IAC 19 (LSA Document #09-615) as required under IC 13-18-10.

3. Policy rationale or goal.

A. Indiana's current CAFO rules are inconsistent with federal CAFO standards and do not address the issues decided in *Waterkeeper*. Adopting the national standards for CAFOs will ensure that adequate standards are in place while minimizing cost and burden to regulated entities.

B. This rule will ensure that CAFOs properly manage manure generated by their operations consistent with current federal requirements that are applicable nationwide and will make Indiana's

CAFO rules consistent with the CWA and the national NPDES program. This rule will also protect the interests of CAFOs by shielding them from CWA citizen suits that may result from operating CAFOs that discharge without NPDES permits [see 33 U.S.C. 1365].

C. There has been extensive stakeholder involvement, including a series of public meetings in the winter/spring of 2010 attended by interested persons representing the regulated industry, environmental interests and consultants, academia, and the public. Formal public notice and opportunity to comment was provided during the first and second public comment periods provided in the rulemaking process and will continue through the two public hearings and third comment period under IC 13-14-9-4.5.

4. Methodology. CAFOs are point sources under CWA section 502(14) (33 U.S.C. 1362(14)) and 40 CFR 122.23. As point sources, discharges from CAFOs must be regulated under the NPDES program as required under CWA section 402 (33 U.S.C. 1342).

#### **B. Evaluation of Costs and Benefits**

1. Primary benefit. The primary benefit of this rule is to protect the waters of the state of Indiana by ensuring that nutrient run-off from CAFOs is minimized and kept out of the surface waters of the state.
2. Secondary benefits. Secondary benefits of this rule are: (1) decreased costs associated with illnesses resulting from manure discharged into surface or ground water, and (2) bringing large CAFOs into compliance with federal law, protecting farmers from lawsuits alleging that they are discharging without adequate NPDES permits. These benefits are extremely important but cannot be meaningfully quantified.
3. Compliance costs and estimate of cost savings. The EPA has estimated that these changes will result in an annual federal net cost increase to Indiana CAFOs of less than \$15,000, based on Indiana's CAFOs representing 3% of the national total.<sup>2,3</sup> This amount will be reduced further in response to the *National Pork Producers v. EPA* decision by eliminating the cost of preparing the no-discharge certification for non-discharging CAFOs (40 CFR 122.23(i)). We have removed that provision from the most recent draft of the rule proposed for preliminary adoption.
4. Administrative expenses. All administrative requirements in this rule result from the federal regulations incorporated by reference. One provision was added to allow currently permitted CAFOs to transition to approvals under 327 IAC 19 without excessive additional paperwork. That transition provision will eliminate extra administrative costs to those facilities.
5. Federal v. state costs and savings. Because this rule incorporates the federal NPDES requirements without substantive change, all costs and savings associated with this rule are imposed as a result of the federal requirements. This rule makes no requirements that exceed the federal requirements, therefore the annual estimated non-federal economic impact of this rule to regulated entities is \$0.

#### **C. Examination of Alternatives**

1. Alternatives defined by statute. This rule adopts the provisions of EPA's final CAFO rule and complies with the NPDES permitting requirements of the CWA and 40 CFR 122. It also implements the recent decision in *National Pork Producers v. EPA* which held that a CAFO that does not discharge is no longer required to obtain an NPDES permit.

2. Feasibility of market-oriented approaches. A non-discharging CAFO may decide to retain its NPDES permit or to exit the NPDES program and operate under a CFO approval under 327 IAC 19. This determination is made by the regulated entity and is based on market-oriented decisions.
3. Improving availability of information. Because NPDES permits are required by federal law, alternatives such as improving availability of information cannot provide the same amount of environmental protection and shielding from citizen suits as an approval issued by IDEM and would not meet the requirements of the CWA and *Waterkeeper*.
4. Variety of enforcement methods. This rule must be enforced as required by IC 13-30 and the CWA.
5. Performance standards. This rule includes appropriate performance standards as part of the state water quality standards and effluent limitations in 327 IAC 15-16-8 and in references to standards in 327 IAC 19. In contrast, the rule includes design standards where they are specified in the federal rule. In most cases, standards labeled as "design standards" function more like performance standards when they describe a process that leads to an acceptable result rather than dictating the form of the final result. In some cases, a design standard is preferable to a performance standard where it provides certainty, reduces development cost, and assures the operator that every competitor is doing the same thing and everyone is competing on a level playing field.
6. Differential requirements. This rule is part of a two-rule project that is differentiated by size. This rule regulates certain CAFOs, the largest class of regulated entities. The companion CFO rule (LSA Document #09-615) is designed to regulate the smaller CFOs.
7. Baseline. The baseline for this analysis is the current CAFO rules in 327 IAC 5-4-3, 327 IAC 5-4-3.1, and 327 IAC 15-15. Leaving these rules in place would continue to make Indiana's CAFO standards inconsistent with the CWA as defined in *Waterkeeper* and leave CAFO operators in Indiana vulnerable to federal enforcement and lawsuits based on the inadequacy of their permits.
8. Different compliance dates. Compliance dates in this rule are based on the *Waterkeeper* decision. As a result, this rule will be fully implemented on the effective date of the rule.
9. Redundancy. This rule does not duplicate other standards in federal or state law. As an authorized state, these rules will operate in lieu of the federal rules when they are implemented. Since this rulemaking will repeal 327 IAC 5-4-3, 327 IAC 5-4-3.1, and 327 IAC 15-15, this rule will be the only rule for CAFOs that remain in the NPDES permitting system.

#### **D. \$500, 000 Fiscal Impact**

The estimated net annual economic impact of this rule is less than \$500,000 to the regulated entities. Using the EPA's analysis of the costs of the federal rule, this rule will result in an annual federal net cost increase of \$15,000 assuming Indiana as 3% of the national total.<sup>3</sup> However, because all the changes adopted in this rule are required by federal law and regulations, we estimate this rule will result in an annual non-federal net cost increase to discharging CAFOs in Indiana of \$0.

#### **E. Sources used in determining costs and benefits, including studies to support the policy rationale and types and quantifications of the costs and benefits.**

- Indiana Department of Environmental Management, Office of Land Quality
- "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision," Federal Register, November 20, 2008 (73 FR 70418)

No independent verification of these estimates has been performed.

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<sup>1</sup> IDEM Office of Land Quality, <http://www.in.gov/idem/4994.htm#cfos>

<sup>2</sup> "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision," Section IV. Impact Analysis, Federal Register, November 20, 2008 (73 FR 70468-70471)

<sup>3</sup> Based on 625 Indiana CAFOs ÷ 20,685 CAFOs nationwide = 0.0302151.